

A PB SECURITIES SDN BHD

v.

JUSTIN ONG KIAN KUOK

B HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI MAKINUDIN J
[SUIT NO: D3-22-705-1998]
8 SEPTEMBER 2006

C **CONTRACT:** *Sale of shares - Contra losses - Whether client bound by terms and conditions in Individual Application Form - Client's responsibility to settle share trading losses - Whether client had knowledge of status of his account - Whether transaction invalidated by breach of trading limit - Trading limit for internal use only - Whether stock broking firm has discretion to permit such trading*

D **SECURITIES:** *Shares - Share trading - Contra losses - Allegation of account manipulation by remisier - Client never complained of any irregularity in trading account*

E **CIVIL PROCEDURE:** *Parties - Share trading, claim for contra losses - Stockbroker's claim against client founded on doctrine of subrogation - Client's losses set-off against remisier's deposit - Privity of contract exists between stockbroker and client as contracting parties*

F The plaintiff's claim against the defendant was in respect of contra losses incurred in the defendant's share trading account arising from the purchase and sale of shares under the terms and conditions of the Individual Application Form entered into between the plaintiff and defendant. The plaintiff contended that it had the right to pursue the claim against the defendant, notwithstanding that the debt was deducted from the remisier's deposit. The defendant contended that he did not
G give instructions to the remisier of the plaintiff's company to conduct the shares trading for and on his behalf which resulted in losses in the defendant's account and that the shares trading were manipulated by the said remisier. The defendant also alleged that numerous transactions were done far in excess of the trading limit.

H **Held (allowing the claim with costs):**

I (1) The defendant had signed the Individual Application Form for the shares trading transaction. He was therefore bound by the terms and conditions stated therein and was aware of his responsibility to settle the losses in the said shares trading transaction. (para 3)

- (2) The defendant had admitted receiving several of the contract notes, contra statements and monthly statements from the plaintiff. The defendant had full knowledge of the status of his account at the material time. (paras 6 & 8) A
- (3) The defendant's allegation that his account was manipulated by the remisier was unfounded since the defendant had admitted that he had never complained of any irregularity in his trading account at the material time. Even if the transaction exceeded the trading limit this alone did not invalidate the transaction. The breach of the trading limit is only for internal use and it is up to the plaintiff in its discretion to permit such trading. (paras 9 & 13) B C
- (4) The plaintiff's claim against defendant was founded on the doctrine of subrogation. The outstanding losses from the defendant were set-off against the remisier's deposit. Hence the amount owing from the defendant would be credited back to the remisier's deposit upon payment by the defendant. In the circumstances, the correct party to commence this action was the plaintiff's company since the privity of contract only existed between the plaintiff and the defendant as the contracting parties for the said transactions. (paras 16 & 17) D E

Case(s) referred to:

Arab-Malaysian Securities Sdn Bhd v. Chan Mon Hoi [2000] MLJU 774 (**refd**)
Dhanaraj Jayaram v. M & A Securities Sdn Bhd [1998] MLJU 526 (**refd**)
Ong & Co Pte Ltd v. Foo Sae Heng [1990] 1 CLJ 856; [1990] 3 CLJ (Rep) 820 HC (**refd**)
Sarawak Securities Sdn Bhd v. Andy Chan Chiauw Guan [2000] 7 CLJ 364 HC (**refd**) F

Legislation referred to:

Evidence Act 1950, s. 90A(1)

For the plaintiff - Ravindra Kumar (Christopher Arun, Peter Douglas Ling, Mary Song & Benjamin Kong with him); M/s Raja, Darryl & Loh G
For the defendant - Idris Mohd Isa (Zulhasmi Zakaria & Adi Hazlan with him); M/s Idris & Partners

Reported by Amutha Suppayah H

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A **JUDGMENT**

Zulkefli Makinudin J:

The Plaintiff's Claim

- B [1] The plaintiff's claim against the defendant is in respect of contra losses incurred in the defendant's share trading account arising from the purchase and sale of shares under the terms and condition of the Individual Application Form entered into between the plaintiff and defendant on 9 September 1993.

C **The Defence**

- [2] The defendant contended that he did not give instructions to the remisier of the plaintiff's company to conduct the shares trading for and on his behalf which resulted in losses in the defendant's account and that the shares trading were manipulated by the said remisier. The defendant also alleged against the plaintiff that numerous transactions were done far in excess of the trading limit.

Decision Of The Court

- E [3] It is my finding there is no dispute that the defendant had signed the individual application form for the shares trading transaction as shown in exh. P1. The defendant therefore must be treated to have been bound by the terms and conditions stated therein and was aware of his responsibility to settle the losses in the said shares trading transaction.
- F [4] Based on the exh. P1 it is my view that the defendant is bound by his undertaking to make immediate payments against delivery of stocks and/or shares purchased on his behalf. The defendant also undertakes to pay the amount of deposit required by him on purchasing contracts made on his behalf, the balance of which (if any) will be paid immediately on delivery of stocks and/or shares. I also find that by virtue of the said exh. P1 the defendant has authorized the plaintiff to sell out or buy in such stocks and/or shares as may be required and the defendant undertakes to indemnify the plaintiff against all losses in such events should he fail to comply with the conditions stated therein
- G (see exh. P1 of ABD cl. (d)). Under exh. P1 the defendant also authorizes the plaintiff to utilize monies due to the defendant to set-off his liabilities in the plaintiff's company and agrees to pay interest on the outstanding debit balance of his account should there be a delay in settlement (see cls. (e) and (f) of exh. P1).

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[5] On the validity of exh. P1 signed by the defendant and the defendant's obligation therein I would like to refer to the case of *Sarawak Securities Sdn Bhd v. Andy Chan Chiaw Guan* [2000] 7 CLJ 364 HC wherein the court *inter alia* held as follows:

The application to open a trading account was a valid and binding document whose terms and documents were binding on the defendant. Basically, parties are bound by the terms and conditions of the contract entered into under a trading account for the purchase and sale of shares. The relationship between the parties herein was purely contractual.

[6] It is my finding that the defendant had admitted receiving several of the contract notes, contra statements and monthly statements from the plaintiff. It is noted that the defendant did not challenge them nor lodge a complaint to the plaintiff regarding his account. During the examination-in-chief of PW1 and PW2 it was confirmed that the contract notes, contra statements and monthly statements were forwarded to the defendant by ordinary post to the address stated by the defendant in the application form. The defendant had further confirmed that the address stated was indeed his mailing address.

[7] In this case the plaintiff has further furnished the certificate under s. 90A Evidence Act 1950 wherein all the contract notes, contra statements and monthly statements were produced as evidence during the course of the trial. (See exh. P8). On this point I would like to refer to the case of *Dhanaraj a/l Jayaram v. M & A Securities Sdn. Bhd.* [1998] MLJU 526 wherein the court *inter alia* stated that the contra statements and contra notes were all computer generated documents and the effect of the certificate produced by the respondent in compliance with s. 90A of the Evidence Act 1950 was that the computer generated documents was admissible as evidence of any fact stated therein without having to call the maker of such document. Therefore in the present case by virtue of s. 90A(1) the facts stated in the contra statements and contract notes, namely, what shares had been bought and sold by the order of the defendant had all become properly admitted in evidence.

[8] The evidence of PW2 showed that the contract notes, contra statements and monthly statements were posted to the defendant at his mailing address. The defendant had during cross-examination admitted receiving some of the contract notes and the monthly statements. A reference to exh. P16 showed several letters of demand were sent to the defendant which were admittedly received by him. In the circumstances the defendant had full knowledge of the status of his account at the material time.

- A [9] With regard to the defendant's allegation that his account was manipulated by the remisier I find such an allegation is unfounded since the defendant had admitted during cross-examination that he had never complained of any irregularity in his trading account at the material time. This fact is more apparent since each of the contract notes provides the following statement:
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All errors if any must be notified to us immediately [See exh. P9].

- C [10] It is noted that the transactions involving the subject matter of the plaintiff's claim were incurred between September 1994 to November 1994. The defendant had during cross-examination admitted to carrying out trades during this period. It is my view if indeed there were irregularities in the defendant's account, he would have promptly lodged a complaint. The fact that no complaint was lodged during the period of the trades showed that these allegations are not *bona fide* and amount to an afterthought. On this point I would like to refer to the case of
- D *Ong & Co. Pte. Ltd. v. Foo Sae Heng* [1990] 2 MLJ 85 where the High Court of Singapore held at p 85 as follows:

As regards the point that the defendant had never given instructions to purchase the shares, this point was totally devoid of merit. Debit notes were sent to the defendant.

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The defendant had not denied that he received the debit notes. If in fact the purchases were contrary to instructions, one would expect an immediate protest by him.

- F By not objecting to the documents sent to him, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.

- G [11] The defendant had contended that part of the losses arose as a result of the transactions done in two accounts. However, the plaintiff's remisier (PW3) had testified that the use of the account was at the behest of the defendant and his mother. This evidence was further corroborated by the evidence of PW4 who confirmed this during her evidence. PW3 the remisier had at length in the trial referred to exh. P18 and exh. P11, explaining how the transactions were carried out at the request of the defendant and his mother. The defendant further admitted making payment by his own cheque of RM16,680 for losses incurred in the account of Yock Hing (PW4). This evidence contradicts his own evidence that he was unaware of the use of this account. It is also noted that the defendant's counsel had failed to put the defendant's case across when the witnesses for the plaintiff gave evidence. No attempt was made by learned counsel for the defendant to challenge this aspect of the evidence. The fact that the defendant did not know the
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owners of the account for which some transactions were married is irrelevant if it is shown on the evidence that the defendant did request for these married transactions. The contention of the defendant that the losses in the third party account were dumped into the defendant's account is unfounded and lack *bona fides*.

[12] With regard to the trading limit the defendant had contended that the trading limit of RM150,000 had been breached. However, it is noted there was no evidence adduced by the defence to prove that the defendant had objected to the increased trading limit. For the plaintiff there is evidence of PW1 who testified that the trading limit is a guide for a remisier to determine the amount of transactions that the remisier would allow the client to trade. The trading limit can be breached and it depends on the remisier's assessment of the credit worthiness of the clients, the collateral and the remisier's deposit. This part of the evidence was not challenged by learned counsel for the defendant. There is also the evidence of PW3 (remisier) who testified that at the material time his security deposit was RM746,970.43 and that the plaintiff's company had given him ten times that of his security deposit as a trading limit which means roughly about RM7.4 million.

[13] It is my view even if the transaction exceeded the trading limit this alone does not invalidate the transaction. The breach of the trading limit is only for internal use and it is up to the plaintiff in its discretion to permit such trading. On this point I would like to refer to the case of *Arab-Malaysian Securities Sdn Bhd v. Chan Mon Hoi @ Yeo Mon Hoi* [2000] MLJU 774 wherein the High Court *inter alia* held as follows:

The trading limit imposed by the plaintiff on the defendant was for the plaintiff's own protection. If the defendant intended to transact beyond the trading limit prescribed by the plaintiff, it was up to the plaintiff, in its discretion to permit such trading. In the absence of fraud or cheating, the transactions carried out by the plaintiff based on the defendant's transactions were valid.

[14] On the issue of the losses being set-off from the remisier's deposit pursuant to the remisier's agreement and whether the zero balance in the monthly account constitute a discharge of the amount owing to the plaintiff, I find the plaintiff's witnesses PW1 and PW3 in their evidence had explained to the court how the zero balance came about in the monthly statements. They had testified that they arose as a result of the set-off from the remisier's deposit due to the defendant's failure in settling the debt after a certain period. This set-off according to PW1 and PW3 applied to all remisers in the plaintiff's company in accordance with clause c.1(ii) and c.2(I) under the remisers agreement. (See exh. P5).

- A [15] PW1 further testified that if there was any payment received from the client after the set-off from the remisier's deposit, the said sum would be debited back to the remisier. The zero balance appearing in the defendant's monthly statements arose after the plaintiff deducted the defendant's remisier's deposit. The defendant's liability to pay the
- B plaintiff arises out of the undertakings and indemnities given in his account application form and the zero balance did not come about due to the defendant's settlement of the outstanding losses. I find this part of the plaintiff's evidence was unchallenged and not disputed by the defendant.
- C [16] On the issue of subrogation the plaintiff contends that it has the right to pursue the claim against the defendant, notwithstanding that the debt was deducted from the remisier's deposit. The plaintiff's claim against defendant is founded on the doctrine of subrogation. I find there is merit in the plaintiff's contention. This is clearly borne out by the
- D evidence of the remisier (PW3) where he confirmed that he instructed the plaintiff to commence this action against the defendant for the recovery of the sum due and owing as contained in the amended statement of claim.
- E [17] It is noted that PW1 for the plaintiff had testified that the outstanding losses from the defendant were set-off against the remisier's deposit. Hence the amount owing from the defendant would be credited back to the remisier's deposit upon settlement received from the defendant. In the circumstances, it is my view that the correct party to
- F commence this action is the plaintiff's company since the privity of contract only exists between the plaintiff and the defendant as the contracting parties for the said transactions.
- G [18] Finally, on whether the defendant's remisier had committed fraud against the defendant as contended by the defendant, it is my finding that there is no evidence led by the defendant to prove this. The only evidence raised by the defendant was his allegation about the use of third party accounts for the transaction. This aspect of the issue had been satisfactorily explained by PW3 and PW4. There is the further evidence of the defendant having settled some of these losses involving
- H the third party accounts by the various receipts which were produced during the trial. In the light of the foregoing, the allegation remains unproven and ought to be viewed as an afterthought.

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Conclusion

[19] It is my finding that the plaintiff has succeeded on the balance of probabilities in proving its case against the defendant. For the above stated reasons the plaintiff's claim against the defendant is allowed with costs and I hereby make the orders as prayed for in the statement of claim.

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